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No. 91-8199

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THOMAS LEE DEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

9 pp

QUESTION PRESENTED

Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-14) is reported at 954 F.2d 262.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. The petition for a writ of certiorari was filed on May 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(c), six counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and six counts of using a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. 924(c). Petitioner was sentenced to a total of 168 months' imprisonment on the possession-of-a-firearm count and the bank robbery counts. He was sentenced to additional consecutive terms totaling 105 years' imprisonment on the use-of-a-firearm counts. Pet. App. 15-18. The court of appeals affirmed. Pet. App. 13-14.

1. The evidence at trial showed that petitioner, who had previously been convicted of bank robbery, robbed six banks in the Houston, Texas, area on six different days during a four-month period. The offenses occurred on January 24, February 23, March 1, March 5, March 13, and April 12, 1990. In each robbery, petitioner used a gun. Pet. App. 13, 16.

At sentencing, a dispute arose as to the penalty that should be imposed for petitioner's six firearms convictions under 18 U.S.C. 924(c). Section 924(c) provides in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years * * *.

Section 924(c) additionally specifies:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

Petitioner contended that he should be sentenced to six 5-year terms, while the government urged that petitioner was subject to one 5-year term, to be followed by five consecutive 20-year terms. The district court agreed with the government and, in accordance with the presentence report, sentenced petitioner to a total of 105 years' imprisonment on the six counts. The court of appeals affirmed, noting that "the Eleventh, Eighth, Sixth, Seventh, and Fourth Circuits have previously determined that a 'second or subsequent conviction' under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c)." Pet. App. 14.

ARGUMENT

1. When the court of appeals decided this case, every other court of appeals that had addressed the issue had concluded that a defendant who is convicted in a single proceeding of multiple violations of Section 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions. See United States v. Bernier, 954 F.2d 818 (2d Cir. 1992); United States v. Raynor, 939 F.2d 191, 193-194 (4th Cir. 1991); United States v. Bennett, 908 F.2d 189, 194-195 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); United States v. Nabors, 901 F.2d 1351, 1357-1359 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); United States v. Foote, 898 F.2d 659, 668-669 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); United States v. Rawlings, 821 F.2d 1543 (11th Cir.), cert. denied, 484 U.S. 979 (1987).

The Tenth Circuit, however, recently issued an en banc decision rejecting the reasoning of those courts of appeals. See United States v. Abreu, No. 89-4145 (10th Cir. Apr. 13, 1992). That court concluded that Section 924(c) does not provide unambiguous guidance for sentencing when a single prosecution produces multiple Section 924(c) convictions. Invoking the "rule of lenity," the Tenth Circuit held that Section 924(c)'s enhanced sentencing provisions apply only when the government has obtained a Section 924(c) conviction prior to the "second or subsequent" Section 924(c) offenses. Slip op. 16.

As we explain below, petitioner was properly sentenced in this case. Nevertheless, we do not oppose the issuance of a writ of certiorari to resolve the conflict that now exists among the courts of appeals. Section 924(c)'s prohibitions and penalties play an important role in federal law enforcement efforts, because persons who engage in drug trafficking and crimes of violence regularly carry and use firearms. The specific issue of multiple offense sentencing has great practical importance, because persons who engage in those activities often commit a series of criminal transactions before they are apprehended. Given Section 924(c)'s broad and frequent application, there is a need for a uniform sentencing rule when a single prosecution produces multiple Section 924(c) convictions.

2. Petitioner was properly sentenced under Section 924(c). Petitioner was convicted of six Section 924(c) offenses in a single proceeding. He was therefore properly sentenced to a 5-year term

of imprisonment on the first Section 924(c) conviction and an enhanced penalty on the five "second or subsequent" convictions. 18 U.S.C. 924(c). There is no need to resort to the "rule of lenity," because the statutory language in not ambiguous. Section 924(c) contains no prohibition on the application of an enhanced penalty when the first, second, and subsequent convictions are obtained through a single prosecution. See, e.g., United States v. Bennett, 908 F.2d at 194-195.

The Tenth Circuit's contrary construction -- which allows enhanced sentencing only when the government has obtained a Section 924(c) conviction prior to the "second or subsequent" Section 924(c) offenses -- finds no support in the language of Section 924(c). Indeed, that court's construction actually conflicts with the statutory language. Section 924(c) speaks only to the timing of the convictions -- not the timing of the offenses. If Congress had intended the Tenth Circuit's construction, it would not have employed language that is inconsistent with the Tenth Circuit's result. See United States v. Rawlings, 821 F.2d at 1546.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by mail on June 17, 1992.

ROLAND E. DAHLIN II
FEDERAL PUBLIC DEFENDER
DOLA J. YOUNG
ASSISTANT FEDERAL PUBLIC
DEFENDER
P.O. BOX 61508
HOUSTON, TX 77208-1508

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KENNETH W. STARR
Solicitor General

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